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Appellee's Brief 1976-SC-0416

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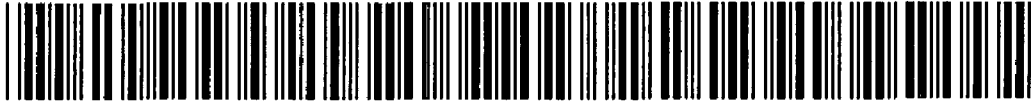
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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-416

JAMES R. YOCOM, Commissioner of Labor
and Custodian of the Special Fund - Appellant

versus

JOE MANUEL,
KENTUCKY COAL COMPANY, and
WORKMEN'S COMPENSATION BOARD - Appellees
AND
KENTUCKY COAL COMPANY - Appellant

versus

JOE MANUEL,
SPECIAL FUND, and
WORKMEN'S COMPENSATION BOARD - Appellees

JUN 25 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

APPEAL FROM THE FLOYD CIRCUIT COURT
HON. HOLLIE CONLEY, JUDGE

BRIEF FOR APPELLEE, JOE MANUEL

W. W. BURCHETT

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Manuel*

(Certificate of Service on inside of front cover)

This is to certify that pursuant to RAP 1.250 a copy of the within Brief has been served by mail on the Hon. William G. Francis, Francis, Kazee and Francis, Attorneys at Law, 130 Court Street, Prestonsburg, Kentucky; Hon. Ronald C. Bakus, Department of Labor, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202; Hon. Kenneth E. Hollis, General Counsel, Department of Labor, Frankfort, Kentucky 40601; Hon. William L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky; and Hon. Hollie Conley, Circuit Judge, Floyd Circuit Court, Prestonsburg, Kentucky 41653, on this the ~~22nd~~ day of June, 1976.

W. W. Burchett

W. W. BURCHETT

Attorney for Appellee, Joe Manuel

TABLE OF CONTENTS AND AUTHORITIES

	PAGE
Issues Presented By the Appellee.....	ii
I. Statement	1- 2
II. Argument	3- 8
A. Cases Cited By Appellants Are Not in Point and Do Not Apply to the Facts in This Case.	3
K.R.S. 342.316 (1) (a).....	3
Childers v. Hackney's Creek Coal Company, Ky., 337 S. W. 2d 62.....	3
Davis v. Harlan Everglow Coal Company, Ky., 392 S. W. 2d 62.....	3
B. Joe Manuel Was Exposed to the Hazards of the Disease in 1973.....	4- 7
Parks v. Beth Elkhorn Coal Company, Ky., 442 S. W. 2d 589.....	7
Wagoner, Comm. v. Marshall, May 7, 1976..	7
C. Two Years Uninterrupted Exposure.....	7
D. Limitations	7- 8
K.R.S. 342.316 (3).....	7- 8
III. Conclusion	8

ISSUES PRESENTED

- I. Was there sufficient evidence to support finding of the Board that claimant was exposed to hazards of pneumoconiosis in 1973?

Appellee answers, "Yes".

- II. Did claimant comply with statute relative to two years continuous exposure?

Appellee answers, "Yes".

- III. Was the claim barred by limitations?

Appellee answers, "No".

SUPREME COURT OF KENTUCKY

File No. 76-416

JAMES R. YOCOM, Commissioner of Labor
and Custodian of the Special Fund - *Appellant*

v.

JOE MANUEL,
KENTUCKY COAL COMPANY, and
WORKMEN'S COMPENSATION BOARD - *Appellees*
AND
KENTUCKY COAL COMPANY - - - *Appellant*

v.

JOE MANUEL,
SPECIAL FUND, and
WORKMEN'S COMPENSATION BOARD - *Appellees*

APPEAL FROM THE FLOYD CIRCUIT COURT
HON. HOLLIE CONLEY, JUDGE

BRIEF FOR APPELLEE, JOE MANUEL

May it please the Court:

I.

STATEMENT

Joe Manuel is a 56 year old coal miner with category II coalworker's pneumoconiosis. For eighteen (18) years, he was exposed to heavy concentrations of coal, sand and rock dust in his employment. Most of this time was spent in the underground mines.

On June 14, 1974, he filed his claim with the Workmen's Compensation Board alleging that he became disabled to work as a result of the occupational disease on January 5, 1973. On December 8, 1975, the Board entered an Opinion and Award finding:

1. His wages justified the payment of maximum compensation.

2. He became totally and permanently disabled on January 5, 1973, as a result of the occupational disease of silicosis. *"Said date was the last date of his injurious exposure to said disease in Kentucky while employed by the defendant, Kentucky Coal Company."*

3. Defendants received due and timely notice.

4. There was a multiple exposure.

He was awarded compensation at the rate of \$63.00 per week for 425 weeks and medical benefits.

An appeal from that award was presented to the Floyd Circuit Court which resulted in an affirmance of the award. That judgment is the subject matter of this action.

Appellants Argument is based on three premises:

1. Whether he was exposed to the hazards of the disease in 1973.

2. Whether he was continuously exposed to the hazards of the disease for two (2) years immediately next before his disability.

3. Whether he filed his claim within one (1) year after discovery of the disease.

II.

ARGUMENT

A.

Cases Cited By Appellants Are Not in Point and Do Not Apply to the Facts in This Case.

Joe Manuel worked for the defendant, Kentucky Coal Company, from April 1972 until January 5, 1973, when the company closed operations. This is not at all like the Brock case where an employee "returned to work for 2 days in February". Dr. O'Neill and Dr. Anderson both testified that even though 4 days exposure would not be sufficient to cause one to contract the disease but stated . . . "it would, of course, always be an added load on to the previous pneumoconiosis, if there were 4 days exposure". The statute (342.316 (1) (a)) contemplates "last injurious exposure" and does not confuse it with exposure sufficient to *cause an employee to contract* the disease. We are concerned here with *last injurious exposure*.

It is not required that the employee prove he did contract silicosis in his last employment, but only that the conditions were such that they would cause the disease over some indefinite period of time.

Childers v. Hackney's Creek Coal Company, Ky.,
337 S. W. 2d 680;

Davis v. Harlan Everglow Coal Company, Ky.,
392 S. W. 2d 62.

B.**Joe Manuel Was Exposed to the Hazards of the Disease in 1973.**

The only evidence before the Board on the question of exposure was given by Joe Manuel and a salty Phoenix, Arizonian named Clarence McCormick. It is apparent that Mr. McCormick never saw Joe Manuel and did not know about the dust or any other facts pertinent to this case.

Joe Manuel, who was on location and acquainted with conditions there, gave this testimony:

“Q. 124. You know whether or not—according to your Form 11, you didn’t work but five days in January. Would you say that the mine was not operating during that five days?

A. Well, it operated I’d say two days in that length of time. For they was cleaning up, bringing their stuff off and getting what stock coal they had off the hill.

Q. 159. On the last day that you worked up there, which was in January, ’73, were you in the dust on those days like you were on other days, same way?

A. Well, they’s dust around there but the tippie hadn’t been running four or five days.

Q. 160. Did the tippie run in ’73?

A. No, I think it—it run one or two days.

Q. 161. In ’73?

A. Yes.

Q. 162. Were you in the dust there when the tippie was running in ’73 just like you were before that time, that right?

A. That's right?

Q. 163. And even when the tippie was running, were you in dust there when they were taking it down and moving it about?

A. Oh, yeah, they was dust there in them trucks. They's coal piled on the ground there and that coal piled on the ground and them trucks and machinery moving over it. It'd stir up the dust and the wind blowing.

Q. 164. Even if the tippie wouldn't running?

A. Yes.

Q. 165. You were exposed to that?

A. Yeah.

Q. 166. I take it that it is true that you worked there in the dust during the last days of your employment there in '73?

A. Yes.

Q. 167. Did you have dust on your clothes?

A. Coal black.

Q. 168. Even then?

A. Yes.

.

A. Yes. Partly. You know they clean up around the tippie and get everything ready for the next day. Be so dusty around there you couldn't see the hand before you and where them trucks and cars would run and after the tippie quit work, cars and trucks come through there and the dust just boil up all night long. Just from the traffic that was on it.

Q. 28. What type of dust are you talking about, road dust?

A. Coal dust, road dust and all. And they have a stock pile there. The wind would blow, blow the dust off it.

.

Q. 39. After they quit operating the tippie were you around there in any other dust?

A. Well, where those—around that stock pile.

Q. 40. Coal?

A. Coal and cars running through there and the dust up knee deep.

Q. 41. How deep would the dust be on the ground around there, coal, sand and rock dust?

A. Well, I'd say that deep there.

Q. 42. What we call shoe mouth deep?

A. Yeah.

Q. 43. Would you walk through that?

A. Sure, I had to watching around—watching over the equipment.

Q. 44. When you walked through that dust, that stir up any dust?

A. Yes.

Q. 45. Would that get on you?

A. Shore it'd get on you.

Q. 46. In the air?

A. Shore it'd get on you and in the air too.

Q. 47. Would you have to breathe that?

A. Well, if you breathed you would.

Q. 48. Then you say vehicles, trucks and cars come through there?

A. Yes.

Q. 49. Would they stir up that dust?

A. Sure they stir it up.

Q. 50. Would you have to breathe that too?

A. Yeah, you'd have to breathe it.

Q. 51. I think you said Joe, that you were in the dust all the time you worked there?

A. I was in the dust all the time I worked there.

Q. 52. From the day you started until the day you quit?

A. Yeah."

Based upon this uncontradicted testimony, the Board made this finding of fact:

“Said date was the last date of his injurious exposure to said disease in Kentucky while employed by the defendant, Kentucky Coal Company.”

Neither the Circuit Court nor this Court has the authority to overturn the factual finding of the Board unless it may be said that the Board’s finding is clearly erroneous on the basis of reliable, probative, and material evidence contained in the whole record.

Parks v. Beth-Elkhorn Coal Company, Ky., 442 S. W. 2d 589;

Wagoner, Comms. v. Marshall, May 7, 1976.

C.

Two Years Uninterrupted Exposure.

Claimant’s last exposure was 1973 and the two year continuous exposure statute was repealed by the 1972 General Assembly.

D.

Limitations.

K.R.S. 342.316 (3) provides:

“The right to compensation under this chapter for disability resulting from an occupational disease shall be forever barred unless a claim is filed with the Workmen’s Compensation Board within *three* years after the last injurious exposure

or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, whichever shall last occur;”

The requirements of this section have been met.

III.

CONCLUSION

The Board and the lower Court have both determined that claimant, Joe Manuel, is disabled by the occupational disease of coalworker’s pneumoconiosis, and that he has met all legal requirements in preserving and presenting his claim. The judgment shall be affirmed.

Respectfully submitted,

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Prestonsburg, Kentucky

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